Supreme Court, U.S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-273

In the Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

JACQUES B. GELIN
JOSHUA I. SCHWARTZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-273

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the United States Army Corps of Engineers was authorized to issue a permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for the construction of a dredged spoil containment facility in Chesapeake Bay, or whether the approval of Congress was required for the project under Section 9 of the Act, 33 U.S.C. 401.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 1

Statement 3

Argument 6

Conclusion 19

TABLE OF AUTHORITIES

Cases:

Citizens' Committee for Environmental Protection v. *United States Coast Guard*, 456 F. Supp. 101 ..... 17, 18

Citizens Committee for the Hudson Valley v. *Volpe*, 302 F. Supp. 1083, aff'd, 425 F. 2d 97, cert. denied, 400 U.S. 949 ..... 10, 15, 16, 17, 18

Gibson v. *United States*, 166 U.S. 269 9

Petterson v. *Resor*, 331 F. Supp. 1302, vacated as moot, 494 F. 2d 124 17

Sierra Club v. *Leslie Salt Co.*, No. C-72-561 WTS (N.D. Cal. Jan. 15, 1980), appeal pending, No. 80-4095 (9th Cir.) 19

Sierra Club v. *Morton*, 400 F. Supp. 610, aff'd and rev'd in part on other grounds, 610 F. 2d 581, cert. granted, Nos. 79-1252 and 79-1502 (Oct. 6, 1980) 18

Page

Cases—Continued:

Udall v. *Tallman*, 380 U.S. 1 12

Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 13

Wisconsin v. *Illinois*, 278 U.S. 367 12

Statutes, rule and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:

Section 404, 33 U.S.C. 1344 4

Section 404(a), 33 U.S.C. 1344(a) 2, 3, 6, 13

Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426 12

Section 7, 26 Stat. 454 ..... 12, 13

Rivers and Harbors Act of 1896, ch. 314, Section 2, 29 Stat. 202 12

Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. 401 *et seq.*:

Section 9, 33 U.S.C. 401 ..... *passim*

Section 10, 33 U.S.C. 403 ..... *passim*

Rivers and Harbors Act of 1970, Pub. L. No. 91-611, Section 101, 84 Stat. 1818 ..... 3, 15

Section 123(a), 33 U.S.C. 1293a(a) 14

Section 123(h), 33 U.S.C. 1293a(h) 14

91 Stat. 1566 3

Fed. R. Civ. P. 54(b) 5

Page

Statutes, rule and regulations—Continued:

33 C.F.R. 209.120(a)(1) (1948) 11
33 C.F.R. 209.120(c) (1948) 11, 12
33 C.F.R. (1969):
Section 209.120(b)(1)(a) 11
Section 209.125(a) 11
33 C.F.R. 209.120(b)(1) (1974) 11
33 C.F.R. 321.2(c) (1979) 12

Miscellaneous:

21 Cong. Rec. 8604-8605 (1890) 13
32 Cong. Rec. (1899):
pp. 2296-2297 12
p. 2923 12
118 Cong. Rec. 33699 (1972) 14
42 Fed. Reg. 37139 (1977) 12
Hearings on General Dam Legislation Before the House Comm. on Interstate and Foreign Commerce, 64th Cong., 1st Sess. (1916) 11
Hearings on Water Pollution Control Legislation —1971 (Oversight of Existing Program) Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971) 11
H.R. Doc. No. 181, 94th Cong., 1st Sess. (1975) 15
H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897) 12

Page

Miscellaneous—Continued:

H.R. Rep. No. 91-1665, 91st Cong., 2d Sess. (1970) 15

J. Murray, *A New English Dictionary* (1897) ... 10

20 Op. Atty. Gen. 488 (1892) 13

Random House Dictionary of the English Language (1967) 16

Webster's New International Dictionary (2d ed. 1954) 16

Webster's Third New International Dictionary (1976) 10

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 621 F. 2d 1281. The opinion of the district court (Pet. App. 23a-56a) is reported at 459 F. Supp. 279. The supplementary opinion of the district court denying motions for reconsideration (Pet. App. 47a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1980. The petition for a writ of certiorari was filed on August 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 9 of the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. 401, provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided* further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the

Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

2. Section 10 of the Rivers and Harbors Act of 1899. ch. 425, 30 Stat. 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established habor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, habor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

3. Section 404(a) of the Clean Water Act, 33 U.S.C. 1344(a), provides in pertinent part:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge

of dredged or fill material into the navigable waters at specified disposal sites. * * *[1]

STATEMENT

1. On February 23, 1972, the State of Maryland applied to the United States Army Corps of Engineers for permission to construct what was called a "diked" disposal area for dredged materials that are to be removed from Baltimore Harbor. The disposal area is to be located on and adjacent to two small islands, known as Hart and Miller Islands, in the Chesapeake Bay, approximately 13 miles east of Baltimore Harbor. The islands are about one mile offshore at a point where the Bay is approximately seven miles wide. The project will entail connecting the two islands with a sand barrier to form one side of a rectangular disposal area located to the eastern, or Bay side of the two islands. Sand barriers will also be built to form the remaining three sides of the rectangular containment area, into which dredged spoil then will be pumped.

Eventually the water mixed with the spoil will percolate through the barrier, leaving a single enlarged island of approximately 1100 acres (Pet. App. 5a-6a). The dredged material from Baltimore Harbor to be deposited in the containment area includes spoil from routine maintenance dredging and additional spoil generated by the Baltimore Harbor Project, a Corps of Engineers project authorized by Section 101 of the Rivers and Harbors Act of 1970, Pub. L. No. 91-611, 84 Stat. 1818, to increase the depth of Baltimore Harbor.

---

[1]The events in issue here took place prior to the adoption of the 1977 Amendments to the Clean Water Act. 91 Stat. 1566. These amendments made minor textual changes in Section 404(a) not relevant here.

The Corps processed the Maryland permit application under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344. The former provision empowers the Corps to permit placement of fill in navigable waters of the United States and to authorize construction of any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" in navigable waters. Section 404 also authorizes the Corps to regulate discharge of dredged spoil into navigable waters. After holding public hearings, and preparing draft and final environmental impact statements, the Corps issued the permit under Sections 10 and 404 on November 22, 1976.

2. Petitioners commenced this action on June 30, 1977, against the Corps, several of its officers, and the Secretary of the Army, seeking declaratory and injunctive relief voiding the Corps' permit. In addition to claims that the environmental impact statement was inadequate in various respects, petitioners alleged that the Corps' permit was improperly issued under Section 10 of the Rivers and Harbors Act of 1899 because, in their view, the barrier that would surround the fill constituted a "dike" for which congressional approval is required under Section 9 of the Act, 33 U.S.C. 401. Section 9 prohibits construction of any "bridge, dam, dike, or causeway over or in any * * * navigable water of the United States" without the consent of Congress, except where the navigable portion of the body of water is found in a single state.[2]

---

[2]In cases falling within the exception, the approval of the Corps and the affected state are sufficient. 33 U.S.C. 401. It is undisputed in the present case that the Chesapeake Bay does not lie wholly within the State of Maryland.

On cross motions for summary judgment, the district court concluded that the Corps was not authorized to issue the permit to Maryland under Section 10 of the Rivers and Harbors Act of 1899 because the project fell within Section 9 of that Act (Pet. App. 23a-46a, 59a-60a). The district court held that congressional authorization was required for any structure within a modern dictionary definition of the term "dike," whenever navigation was displaced to any degree (Pet. App. 39a). The proposed structure was found to satisfy the test fashioned by the district court because "boating will be precluded in the space occupied by the containment area" and "will be moved further out into the Bay" (Pet. App. 42a). The court rejected the Corps' contention that relevant legislative history and longstanding administrative practice and interpretation limit the reach of Section 9 of the 1899 Act to structures that completely span a navigable waterway and therefore have the potential to block the flow of commerce on the waterway. The district court entered summary judgment for petitioners under Fed. R. Civ. P. 54(b) (Pet. App. 59a).[3]

3. The court of appeals reversed, holding that the "diked" disposal area "is not a dike within the meaning of Section 9 and is governed by Section 10 of the statute" (Pet. App. 4a). Based on its review of the language, legislative history, and administration of the 1899 Act (Pet. App. 11a-18a), the court of appeals concluded that the Corps' interpretation of Section 9 as applying to structures that completely span navigable waterways "is a

---

[3]The district court did not consider the other issue raised by petitioners. However, following the court of appeals' decision reversing the district court's holding with respect to the application of Sections 9 and 10, the district court heard argument on October 10, 1980, on cross motions for summary judgment on the remaining claims.

perfectly reasonable construction of the statute, and it has been so construed by the Corps since its passage" (Pet. App. 15a). Moreover, the court found that the legislative history of Section 404(a) of the Clean Water Act, which was adopted in 1972 to authorize the Corps to issue permits for the discharge of dredged or fill materials into navigable waterways "at specified disposal sites" (see pages 2-3, *supra*), demonstrated "that Congress was not only aware of, but approved and encouraged the Corps' practice of issuing permits for diked disposal areas, without specific Congressional approval" (Pet. App. 18a).

Finally, the court of appeals concluded that "the expansive reading of Section 9 put forward by [petitioners] could render Section 10 meaningless, since structures such as jetties, breakwaters, and fills would be covered by Section 9 although they are literally within Section 10" (Pet. App. 20a). On the other hand, in the court's view, "[l]imiting Section 9 to waterway-spanning structures, as the Corps has done, provides a clear, convenient, and workable distinction between Section 9 and Section 10" and results in a "logical and consistent" construction of the two sections which "best effectuate[s] the intent of Congress" in dividing structures into those that have a sufficiently significant impact on navigation to require congressional approval and those that do not (*ibid.*). Accordingly, the court concluded that waterway-spanning structures that "are capable of completely blocking a navigable waterway" require congressional approval under Section 9, while structures that "merely protrude into a waterway and require only a rerouting of waterborne traffic" require only a Section 10 permit from the Corps.

ARGUMENT

1. a. The court of appeals' conclusion that the Corps of Engineers had authority under Section 10 of the Rivers

and Harbors Act of 1899 to issue a permit for the project is correct and does not warrant review by this Court. Section 10 of the Rivers and Harbors Act of 1899 authorizes the Secretary of the Army to authorize a party "to excavate or fill * * * the channel of any navigable water of the United States." The project involved in the case involves the deposit of "fill"—the material dredged from Baltimore Harbor—into the Chesapeake Bay, and thereby quite clearly falls within the scope of the Corps' permit authority under Section 10.

To be sure, the project design calls for construction of a sand barrier around the area into which the dredged material is to be deposited. But there is nothing in Section 10 that excludes a project of this type from the Corps' permit authority merely because the fill is to be contained by a barrier. To the contrary, the sand barrier itself would appear to be "fill" deposited in the Bay, and therefore within the scope of the Secretary's permit authority under Section 10. And, in any event, Section 10 authorizes the Secretary to permit the building of any "wharf, pier, dolphin, boom, weir, *breakwater, bulkhead,* jetty, *or other structures*" in navigable waters (emphasis added)—a range of activities that encompasses building of the containment structure to surround the dredged material in this case.

Notwithstanding the language of Section 10, petitioners argue that a different provision of the Rivers and Harbors Act of 1899—Section 9—withholds permit authority from the Secretary and requires congressional approval for the project involved here. Section 9 provides that it shall not be lawful to construct any "bridge, dam, dike, or causeway over or in" navigable waters of the United States until the consent of Congress has been obtained and the plans for the project have been approved by the

Secretary of the Army. Petitioners argue that the barrier around the containment area is a "dike" for which congressional approval is required under Section 9. It is true that the proposed project in this case has been termed a "diked disposal area." But it hardly follows that the barrier behind which the dredged material is to be deposited is the type of structure about which Congress was so concerned that Congress withheld from the Secretary of the Army the authority to permit its construction.

As the court of appeals observed (Pet. App. 20a), "Sections 9 and 10 * * * must be construed together in a logical and consistent manner in order to best effectuate the intent of Congress." Accordingly, it is necessary to identify a reasoned distinction between those structures Congress believed would have a sufficient impact on navigation that congressional approval should be required and those with a lesser impact such that the Secretary could be entrusted with the authority to permit their construction.

Petitioners' distinction is purely one of labels. If the structure may be called a "dike," congressional approval is required, irrespective of the impact the structure may have on the body of water or its navigability. As is evident, however, this reading of Section 9 makes no practical sense in a case such as this. Thus, petitioners do not contend that congressional consent would have been necessary under Section 9 if the Corps had granted the State of Maryland a permit to deposit fill in the same 1100-acre area *without* building a barrier around it; it is clear that the Corps could have issued a permit under Section 10 for such a project. It is only because the State has elected to build a barrier around the area in order to protect the water quality of the Bay from contamination

by the dredged material that petitioners contend that the project requires congressional approval. We cannot believe that Congress intended to make its delegation of permit authority to the Corps of Engineers under Section 10 depend on whether the perimeter of the containment area is to be constructed before the interior is filled; in either event, the total surface area of the navigable waters to be displaced by the fill and the effect on navigation are the same. An analysis of the language and administrative interpretation of the Act demonstrates that Congress did not, in fact, intend such an anomalous result.

The word "dike" in Section 9 cannot be read in isolation from the language and purposes of that section as a whole, and the complementary purposes of Section 10. An analysis of Section 9, in its entirety, demonstrates that Congress was principally concerned with those structures that will span the entire width of a body of water and thereby create a complete obstruction to navigation, or at least the potential for such an obstruction. Where a project might have such a drastic impact on the navigable body of water, Congress reserved the final decision to itself. But where the navigable water body is not fundamentally altered in this fashion, Congress was content to authorize the Secretary of War (now the Secretary of the Army) to permit projects and accommodate the requirements of navigation.[4]

---

[4]As explained below (see page 16 note 11, *infra*), it is conceivable that Section 9 might also apply to a limited class of levees or dikes constructed in navigable waters for the purpose of rechanneling the navigable course of those waters or otherwise fundamentally altering their navigable capacity, even though the "dike" does not entirely span the waterbody. Cf. *Gibson* v. *United States*, 166 U.S. 269 (1897). That question is not presented in the present case, however, because there is no suggestion that the disposal area was designed to alter the navigable course of the Chesapeake Bay.

This interpretation of Section 9 is strongly suggested by its own terms. Section 9 applies to any "bridge, dam, dike, or causeway" over or in navigable waters. Bridges and dams are, by nature, structures that span a body of water. The word "causeway" also connotes a structure across a body of water or marshland, as a way of access to land on the other side. *Webster's Third New International Dictionary* 632 (1976); J. Murray, *A New English Dictionary* 358 (1897).[5] Read in para materia, the word "dike" in Section 9 therefore must also be taken to mean a structure that spans or cuts off a navigable body of water, or an arm of that body—*e.g.*, to reclaim the area behind the dike from the sea or to prevent flooding. J. Murray, *A New English Dictionary, supra.*[6]

The scope of Section 9 as reaching only structures that span the waterway or block navigation is also evident from the language of the first proviso to that section. The proviso states that, notwithstanding the prohibition in Section 9, bridges, dams, dikes and causeways "may be built under authority of the legislature of a State *across* rivers and other waterways the navigable portions of which lie wholly within the limits of a single State"

---

[5]But see *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083, 1089 (S.D.N.Y. 1969), aff'd, 425 F. 2d 97, 106 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

[6]Indeed, J. Murray, *A New English Dictionary, supra,* defines the word "dike" as a "dam" or "causeway" in several of its definitions, and as a "barrier, obstacle, or obstruction." This strongly reinforces the view that the congressional approval requirement in Section 9 extends only to those structures that could be termed "dikes" which span the waterway and obstruct navigation. See also *Webster's Third New International Dictionary, supra* ("a bank usu. of earth constructed to control or confine water: LEVEE * * * a barrier preventing passage"). But see *Citizens Committee for the Hudson Valley* v. *Volpe*, note 5, *supra*, 302 F. Supp. at 1088-1089; 425 F. 2d at 106.

(emphasis added), provided that the location and plans thereof are approved by the Secretary of the Army before construction.

The interpretation of Section 9 evident from its language is consistent with the long-settled administrative construction of the section as well. Thus, in a lecture delivered to the Company Officer's Class of the Engineer School in 1926, G. W. Koonce of the Corps, who had been instrumental in drafting the Rivers and Harbors Act in 1899, stated that Section 9 applies only "to that class of structures such as bridges and dams which extend entirely across a waterway." Section 10, in Koonce's view, "relates to the construction of works in the nature of wharves, piers, jetties and the like, which project into, rather than cross, the bodies of water in which they are located."[7] Similarly, the Secretary of War testified before the House Commerce Committee in 1916 that Section 10 gives his department "the authority to permit or refuse to permit any obstruction, except the class which extend clear across a stream, however large and important, in any navigable water of the United States."[8]

The Corps' regulations, too, have consistently stated that Section 9 is applicable only to structures "across" a waterway. 33 C.F.R. 209.120(b)(1) (1974); 33 C.F.R. 209.120(b)(1)(a), 209.125(a) (1969); 33 C.F.R.

---

[7]Koonce's statement is printed in *Hearings on Water Pollution Control Legislation—1971 (Oversight of Existing Program) Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 288-289 (1971). Koonce's statement is due particular weight because it reveals that he was continuously associated with the Corps starting in 1886 and was personally responsible for drafting the bill which became the 1899 Act.

[8]*Hearings on General Dam Legislation Before the House Comm. on Interstate and Foreign Commerce*, 64th Cong., 1st Sess. 18 (1916).

209.120(a)(1), (c) (1948). The most recent version of the regulations, promulgated in 1977 (42 Fed. Reg. 37139), is even more specific, defining a "dike" as "an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate water-borne commerce * * *." 33 C.F.R. 321.2(c) (1979). And, finally, as the court of appeals noted (Pet. App. 16a-17a), affidavits of Corps officials in the record in this case attest to a long-standing practice, traced back to 1920, limiting the application of Section 9 to waterway-spanning structures and specifically attesting to the consistent use of Section 10 for diked disposal facilities for dredged spoil since passage of the 1972 Amendments to the Clean Water Act. Reference to the Corps' interpretation is especially appropriate given its role in drafting the 1899 Act and continuing responsibility for all facets of its administration. *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929); see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[9]

---

[9]There are virtually no legislative materials directly relating to the 1899 Act itself. The 1899 Act was drafted by the Corps at the direction of Congress. Rivers and Harbors Act of 1896, ch. 314, Section 2, 29 Stat. 202, 234; H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897). The 1899 Act was adopted with little discussion, on the strength of assurances that it contained no significant changes in prior law. 32 Cong. Rec. 2296-2297 (1899) remarks of Senator Frye); *id.* at 2923 (statement of House conferees). This Court accordingly has labeled the 1899 Act as the "rearranged result" of the Rivers and Harbors Act of 1899. *Wisconsin* v. *Illinois, supra*, 278 U.S. at 412.

The Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426, made no mention of "dikes." Section 7 of the 1890 Act, 26 Stat. 454, however, contained three colorably relevant provisions, which, on their face, overlap (see Pet. App. 63a). The first clause (the source of the second clause of Section 10 of the 1899 Act), prohibited building of "any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, *or structure of any kind*" in navigable waters, beyond established harbor lines, without the permission of the Secretary of War (Pet. App. 63a; emphasis added). The second clause of Section 7

b. Section 404(a) of the Clean Water Act, first adopted in 1972, and its legislative history provide firm support for the Corps' interpretation of the 1899 Act. As enacted in 1972, Section 404(a) provided (emphasis added):

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters *at specified disposal sites*.

In an effort to diminish the importance of this provision, petitioners suggest (Pet. 20) that the reference to "disposal sites" is to both land and water-based facilities. This suggestion is plainly erroneous, for Section 404 governs discharge of fill "into the navigable waters." Petitioners also question (Pet. 20) whether the reference

---

(the source of Section 9 of the 1899 Act) proscribed construction of "any bridge, bridge-draw, bridge piers and abutments, causeway, *or other works*" in navigable waters, pursuant to state legislation, without the approval of the Secretary (emphasis added). However, a proviso to the Section made it clear that states were not empowered by the second clause to license bridge works on interstate navigable waters. The effect of the proviso was to retain for *Congress* the authority to license bridge works in interstate navigable waters. 20 Op. Atty. Gen. 488 (1892). The legislative history of the 1890 Act shows that the second clause was designed to fill the gap in federal navigational controls revealed by this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 13 (1888), and cases cited therein, permitting states to construct water-spanning structures. 21 Cong. Rec. 8604-8605 (1890) (remarks of Senators Dolph, Edmunds and Gray). Finally, the third clause of Section 7 (the source of the third clause of Section 10 of the 1899 Act) prohibited excavation, filling, or other actions altering the condition of a navigable waterway without the approval of the Secretary. Clearly the clauses of Section 7 are mutually inconsistent unless some principled limitation is placed upon the reach of each, for each is literally applicable to structures that might be called a "dike." Thus, the distinction between structures which protrude into navigable waters without cutting off navigation and those that cut off navigation appears to have been implicit in the 1890 Act as well.

to "disposal sites" encompasses *diked* disposal facilities. But petitioners' doubt in this regard is entirely dispelled by the remarks of Senator Muskie, the primary Senate manager of the 1972 Amendments, when he presented the Conference Report. He stated that the "Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled"; he continued:

> At the same time the Committee *expects the Administrator* [*of EPA*] *and the Secretary* [*of the Army*] to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes—to identify land-based sites for the disposal of dredged spoil and, where land-based disposal is not feasible, *to establish diked areas for such disposal.*

118 Cong. Rec. 33699 (1972) (emphasis added). Thus, Congress clearly did not believe that the Corps needed to secure its approval for each and every diked disposal area constructed or permitted under the Clean Water Act.[10]

---

[10]As petitioners note (Pet. 20), the remarks of Representative Vanik were principally concerned with diked disposal areas in the Great Lakes constructed pursuant to Section 123(a) and (h) of the Rivers and Harbors Act of 1970, 33 U.S.C. 1293a(a) and (h), which provides that Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, "shall not apply" to projects in the Great Lakes constructed pursuant to Section 123. But Senator Muskie's remarks on behalf of the Senate conferees plainly are not so limited. Moreover, contrary to petitioners' suggestion (Pet. 20-21), the provision in Section 123 of the 1970 Act that Section 9 of the Rivers and Harbors Act is inapplicable to Great Lakes projects does not reveal a congressional understanding that diked disposal areas require congressional approval under Section 9. Section 123 is best understood as a precautionary clarification of congressional intent with respect to the Great Lakes projects authorized therein. Indeed, Congress was fully aware that the Baltimore Harbor Channel Project, authorized by a

2. Petitioners urge (Pet. 11-15) that the Court grant their petition to resolve what they perceive to be a conflict in the lower courts regarding the scope of Section 9. They place principal reliance upon *Citizens Committee for the Hudson Valley* v. *Volpe,* 302 F. Supp. 1083 (S. D. N.Y. 1969), aff'd, 425 F. 2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970). In that case, the Corps had issued a permit under Section 10 for the construction of a state highway on fill in the Hudson River north of the Tappan Zee bridge.

The district court in *Hudson Valley* concluded, with little discussion, that retaining walls constructed of rocks (termed "dikes" in the Corps' permit and the State's plan) designed to prevent the fill from returning to the waterway were "dikes" within the meaning of Section 9, and therefore required congressional approval. The court apparently was not presented with, and therefore did not consider, the evidence of legislative intent and administrative interpretation considered by the Fourth Circuit in the present case. Indeed, the district court expressly noted that it was making its decision in "the absence of any legislative or judicial authority." 302 F. Supp. at 1089. Nor did the district court in *Hudson Valley* analyze the language of Section 9, read as a whole; its

---

separate provision of the Rivers and Harbors Act of 1970, *would* entail use of diked disposal facilities. See H.R. Rep. No. 91-1665, 91st Cong., 2d Sess. 10 (1970); H.R. Doc. No. 181, 94th Cong., 1st Sess. xi, 7, 9, 11-12, 67, 79, 86 (1975). The September 21, 1970, Report of the Chief of Engineers and attached documents, which were the basis for congressional authorization, see 84 Stat. 1818, expressly required that diked disposal be employed. This report is reprinted in H.R. Doc. No. 181, 94th Cong., 1st Sess. 1-10 (1975). Thus the Rivers and Harbors Act of 1970 does not support petitioners' argument. In any event, more recent and unequivocal indications of congressional intent in connection with the 1972 Amendments to the Clean Water Act supersede any ambiguous indications that might be derived from the 1970 Act.

relationship with Section 10; or the policies that underlay Congress' decision to withhold permit authority from the Secretary with respect to the structures mentioned in Section 9. The court looked instead to the phrase "any * * * dike" in Section 9 in isolation and, applying what it believed to be the ordinary meaning of that word, concluded that the rock retaining wall was a "dike" within the meaning of that Section. The court rejected the government's suggested definition of the term "dike," drawn from a technical dictionary, as a wall or embankment "built as a training works for a river so as rigidly to confine flow within definite limits over the length treated." 302 F. Supp. at 1088.[11] Even accepting the government's definition, however, the court concluded that the rock embankment was a "dike" because it would control the river by preventing it from eroding the fill and returning to its natural shoreline and because the evidence showed that the structure would increase the force of the ebb tide by 10%. *Id.* at 1089.[12]

---

[11]It is conceivable, as we suggested in *Hudson Valley*, that a structure that does *not* completely span a body of water, but is designed to confine and channel the waters of a river in a manner that fundamentally alters its course or flow may also be a "dike" requiring congressional approval under Section 9. See note 4, *supra*. But that question is not presented in this case, and its resolution may wait for another day.

[12]The district court in *Hudson Valley* erred in concluding that the proposed rock embankment was a dike in the ordinary meaning of that word. One of the definitions quoted by the court, like the technical definition offered by the government, expressly refers to a structure designed to control or hold back *waters* of a sea or river. 302 F. Supp. at 1089, quoting *Random House Dictionary of the English Language* 403 (1967). The rock structure in *Hudson Valley* had the opposite purpose of holding back the *earth*. The other definition quoted was from the *Webster's New International Dictionary* 730 (2d ed. 1954). As pointed out above (see note 6, *supra*), the Third Edition of that Dictionary refers to a bank of earth used to control *water*, not to prevent erosion of land.

The court of appeals affirmed in an opinion devoted primarily to "[i]mportant threshold questions" of jurisdiction and standing. See 425 F. 2d at 101-106. The court of appeals considered the merits of the controversy only "briefly," devoting but one paragraph to the question of whether a "dike" was involved. 425 F. 2d at 106. The court stated merely that it had "reviewed the pertinent evidence" and governing rules of statutory construction and adopted the conclusion of the district court that the word "dike" used in the Corps' permit had the same meaning as in Section 9, and that congressional approval was required. That is the sum of the Second Circuit's analysis. Thus, one cannot confidently discern from the Second Circuit's opinion whether it fully embraced the district court's "ordinary meaning" definition of the word "dike," or whether it saw no need to choose between that definition and the one proffered by the Corps because each was satisfied on the basis of the evidence in that case. Accordingly, because there is no contention here that the Chesapeake Bay project would satisfy the Corps' definition of the term "dike" offered in *Hudson Valley*, it is not clear whether, or to what degree, the decision below actually conflicts with the Second Circuit's holding in *Hudson Valley*.

Moreover, the Fourth Circuit in the instant case recognized (Pet. App. 9a) the government's contention that "the record before the court in *Hudson Valley* was deficient because it did not contain the full legislative and administrative history materials presented * * * in this case." The Fourth Circuit therefore relied upon its own review of the materials that *were* presented in this case, and reached a contrary conclusion.[13] It is entirely possible

---

[13]The district court in *Petterson* v. *Resor*, 331 F. Supp. 1302, 1306 (D. Or. 1971), vacated as moot, 494 F. 2d 124 (9th Cir. 1974), in concluding that fills to accommodate an airport expansion were not

that the Second Circuit would follow the approach of the Fourth Circuit in this case if it were presented with the evidence of statutory purpose, legislative intent, and administrative interpretation presented to the Fourth Circuit, particularly if the Second Circuit case were to arise in a different factual setting.[14] If it does not do so in some future case, there will be time enough for this Court to consider the issue. But, for the present, as the Fourth Circuit noted (Pet. App. 9a-11a), the trend in the lower courts since *Hudson Valley* was decided has been

---

"dikes," likewise noted that the government had "presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*." See also *Citizens' Committee for Environmental Protection* v. *United States Coast Guard*, 456 F. Supp. 101, 113 (D. N.J. 1978). The only case cited by petitioner that purports to follow *Hudson Valley* is *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-627 (N.D. Cal. 1975), aff'd and rev'd in part on other grounds, 610 F. 2d 581 (9th Cir. 1979), cert. granted on other issues, Nos. 79-1252 and 79-1502 (Oct. 6, 1980). But in that case, the proposed Peripheral Canal would *cross* the middle of the river, completely damming the river without provision for passage. Hence, the court concluded that the structure would be a "dam" or "dike" within the meaning of Section 9. The result in *Sierra Club* v. *Morton* therefore is consistent with our position here.

The Section 9 issue was not raised before the court of appeals in *Sierra Club* v. *Morton* and is not before this Court in Nos. 79-1252 and 79-1502, which raise wholly separate questions of whether there is a private right of action under Section 10 and whether Section 10 applies to diversions for a state water project. Accordingly, contrary to petitioners' suggestion (Pet. 13 n.16), there is no occasion for this Court to grant the petition for a writ of certiorari in this case in order to consider it along with those cases.

[14]We also note that *Hudson Valley* was decided before Congress enacted Section 404(a) of the Clean Water Act in 1972. As we have noted (see pages 13-14, *supra*), the language and legislative history of Section 404(a) indicate that Congress did not intend that congressional approval would be required for the construction of "diked" disposal areas.

consistent with the decision of the Fourth Circuit in this case. Therefore, it is not clear that there is a live conflict in the lower courts, much less a conflict warranting this Court's intervention.

We note in this regard that, as *amicus Sierra Club* points out (Br. 7), an appeal is now pending before the Ninth Circuit in *Sierra Club* v. *Leslie Salt Co.*, No. 80-4095, from a decision by the District Court for the Northern District of California (C-72-561 WTS (Jan. 15, 1980)), which is consistent with the Fourth Circuit's decision in the present case regarding the interpretation of the term "dike" in Section 9. If the Ninth Circuit affirms that judgment, it will reinforce the consistent trend declining to adopt the broad reasoning by the district court in *Hudson Valley*. And if the Ninth Circuit reverses on the Section 9 issue, there would be a more direct and contemporaneous conflict that may warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

JACQUES B. GELIN
JOSHUA I. SCHWARTZ
Attorneys

OCTOBER 1980

DOJ-1980-10